



Department of
Agriculture

Governor John R. Kasich • Lt. Governor Mary Taylor
Director David T. Daniels

Legal Office
8995 East Main Street, Reynoldsburg, OH 43068
Phone: 614-728-6430 • Fax: 614-995-4585
www.agri.ohio.gov • legal@agri.ohio.gov

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United States Environmental Protection Agency
Attn: Julianne Socha
77 W. Jackson Blvd. WN-15J
Chicago, IL 60604

Sent Via Email: socha.julianne@epa.gov

RE: Dayton Malleable Civil Penalty Policy & ODA's Administrative Civil Penalty Policy

Dear Ms. Socha:

Please find enclosed a copy of the case, *State ex rel. Brown v. Dayton Malleable* (Montgomery C.P. 1979), 13 ERC 2189, 2195, upheld, *State ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St.3d 151.

Dayton Malleable is the controlling case that Ohio courts use to assess civil penalties in judicial environmental enforcement cases. Per *Dayton Malleable*, the factors a court considers to determine the amount of civil penalties that should be reasonably and appropriately assessed for violations of Ohio's environmental statutes are: (1) the violator's defiance, recalcitrance, and/or indifference to the law; (2) actual harm or threat of harm to the environment caused by the violations; (3) economic benefit gained by the violator for noncompliance or delayed compliance with the law; and (4) extraordinary enforcement costs incurred by the State.

Ohio Revised Code ("R.C.") 903.16(D)(2) authorizes the Director of ODA to bring an action for civil penalties against a person who has violated or is violating a rule adopted under R.C. 903.08, the terms and conditions of a NPDES permit, the NPDES provisions of a permit to operate, rules adopted under 903.10(E), or an order issued under R.C. 903.17(B). Pursuant to R.C. 903.17(D)(2), the civil penalty shall not exceed \$10,000 per day of violation. Each day of violation is a separate offense. Consistent with the standards and guidelines established in *Dayton Malleable*, the assessment of a civil penalty for violating R.C. 903.08 lies within the court's informed discretion if the amount assessed is less than the statutory maximum.

As with other Ohio environmental protection and civil penalty statutes, the Ohio General Assembly intended to use economic sanctions as a deterrent to violations of R.C. Chapter 903 and the rules promulgated thereunder to protect Ohio's water resources from agricultural pollution. Accordingly, a civil penalty assessment under R.C. 903.17(D)(2) serves as a specific and general deterrence to noncompliance with the law — it serves as a specific deterrent to prevent future violations by the individual violator and serves as a general deterrent to discourage environmental violations on an industry-wide basis. See *Dayton Malleable*, 1 Ohio St.3d at 157. Nevertheless, it is well settled law in Ohio that a civil penalty must be large enough to impact the violator for environmental violations, but no so large as to result in the violator's



bankruptcy. See *State ex rel. DeWine v. Deer Lake Mobile Park, Inc.*, 2015-Ohio-1060, 29 N.E.3d 35, 2015 Ohio App. LEXIS 998 and *State ex rel. Petro v Maurer Mobile Home Court, Inc.*, 2007-Ohio-2262, 2007 Ohio App. LEXIS 2103. The burden is on the violator to show that the impact of a penalty would be ruinous or otherwise disabling. *State ex rel. Dann v. Meadowlake Corporation*, 2007-Ohio-6798, 2007 Ohio App. LEXIS 5949.

Finally, please find enclosed a copy of ODA's administrative civil penalty rules as set forth in Ohio Adm.Code 901:10-5-04. Pursuant to Ohio Adm.Code 901:10-5-04(D), the Director has the discretion to assess a civil penalty for violations of R.C. 903.16 (State PTI and PTO program) and 903.17 (State NPDES Program) in consideration of the following factors:

- The economic benefit (if any) resulting from the violation;
- The economic impact on the violator;
- Acts of nature or acts of third parties that resulted in or contributed to violations;
- Any history of such violations, including recalcitrance resulting in costs incurred by the Director to enforce any previously issued final orders;
- Any good-faith efforts to comply with applicable requirements;
- Any supplemental environmental projects (SEPs) that may be undertaken by the owner or operator to off-set some of the amount of civil penalty payable to the livestock management fund if the Director finds that any project may enhance the owner's or the operator's compliance;
- The seriousness or magnitude of the violation or violations;
- The gravity of effect of the violation or violations; and
- Such other matters as justice requires

Also, Ohio Adm.Code 901:10-5-04(E) contains a penalty matrix the Director of ODA may use to modify a civil penalty amount in consideration of the following: (1) the magnitude or seriousness of the violation; (2) the gravity of the violation; and (3) whether the violation is the first violation or a past violation. See Ohio Adm.Code 901:10-5-04(E)(1).

Under the penalty matrix contained in the Ohio Adm.Code 901:10-5-04(E)(2), the magnitude or seriousness of a violation may be classified as a Category I (major) violation. Examples of Category I violations include the discharge of manure that enters the waters of the state, either without a permit or from a point source not authorized by a permit.... See Ohio Adm. Code 901.10-5-04(E)(2)(a)(iii).



I trust that the information above adequately answers any questions that you previously had regarding this matter. However, please feel free to contact me if any further clarification is needed.

Sincerely,
OHIO DEPARTMENT OF AGRICULTURE



Timothy G. Schirmer, Esq.
Senior Staff Counsel

cc: Kevin Elder, Chief
Dustin J. Calhoun, ODA Chief Legal Counsel
Catherine A. Carney, Assistant Attorney General
Kelly D. McCloud, Assistant Attorney General

